78

SEP 9 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 159.

CARROLL L. JOHNS, PETITIONER,

VS.

ASSOCIATED AVIATION UNDERWRITERS ET AL.,
RESPONDENTS.

PETITIONER'S REPLY TO RESPONDENTS' ANSWER TO PETITION FOR CERTIORARI.

FRED W. MOORE,
1003 State National Building,
Houston, Texas,
Attorney for Petitioner.

INDEX

Point I 1
Point II 3
Point III 5
Point IV 7
Point VI 8
Conclusion 11

Table of Cases

Cobb vs. Garlington, 193 S. W. 463 5-6
International & G. N. R. Co. vs. Edmundson, 222 S. W. 181 6
McDaniel vs. King, 16 S. W. 2d 931 6
Smith vs. The State, 32 Tex. 594 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 159.

CARROLL L. JOHNS, PETITIONER,

VS.

ASSOCIATED AVIATION UNDERWRITERS ET AL., RESPONDENTS.

PETITIONER'S REPLY TO RESPONDENTS' ANSWER TO PETITION FOR CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Carroll Lee Johns, respectfully asks that this Court consider this reply to respondents' answer to his petition for writ of certiorari.

I.

On page two of respondents' answer it is stated that Firemen's Fund Insurance Company and Firemen's Fund Indemnity Company were the insurers under the policies

covering the fleet of airplanes owned by Superior Oil Company and that Associated Aviation Underwriters is a mere department of the various respondent insurance companies. These statements seem to us to be contradictory. If Associated Aviation Underwriters is a department of sixty-one companies why aren't they all insurers? Why should only two of the companies be considered insurers?

Petitioner's third amended original complaint upon which this case was tried names as defendants thirteen different insurance companies in addition to Associated Aviation Underwriters and Superior Oil Company (R. 158). It is the petitioner's contention under respondents' contract in New York, which we will hereinafter refer to and which we were not allowed to investigate or read or offer in evidence, that all the members of the Associated Aviation Underwriters, which was a partnership of corporations, could have been joined as defendants, that is, all the sixty-one different member companies (R. 382). Said agreement will show, we contend, that they all shared in the profits and losses of the Association. We were not allowed to prove said partnership agreement or agreements.

As set out on pages 20 and 21 of our brief in support of the petition, this particular (Superior Oil Company) risk was divided up among thirty-two of the member companies (R. 458, 459).

All the thirteen companies named as defendants in this suit have permits to carry on business in Texas. Of the thirty-two companies that divided this particular risk, some four companies (see page 24 of our brief) did not have a permit to do business in Texas (R. 461).

If Associated Aviation Underwriters is the aviation insurance department of the sixty-one companies, obviously any of these companies who have no authority to do business in Texas have one of their departments here and is therefore doing business in Texas.

We deny that the department of a corporation is an entity. We deny that corporations can escape liability by contending that the suit is brought only against a hand or a foot or the head of the corporate body, as distinguished from the corporate entity. The obvious fallacies in respondents' argument need no further elaboration.

II.

The evidence is plain that the inspection and the report here involved were routine. It was a service expected by the insured and ordinarily initiated either by the insured or the insurer, that is, Associated Aviation Underwriters.

Because of the statement in respondents' answer that the record does not support our contentions, we shall quote that testimony in part, as follows:

> "Q. Mr. Herbert, I believe that I started to ask you and was diverted, with reference to how you happened to make this investigation of the Superior Oil Company aviation facilities. Do you know whether or not Superior made any request to the Associated Aviation Underwriters, or how was that investigation brought about?
>
> "A. Well, I am not positive. I believe an accident they had at Rome was probably the motivating factor, or whether we were asked to make it, we frequently, almost always on accounts of this size, we make one inspection a year whether there is any accident or not. As a matter of fact, I am going out tonight to make another one of them.

"Q. In other words, it is the custom and practice of the Associated Aviation Underwriters from time to time to make inspections of their assureds, is that correct?

"A. That is correct, and particularly in regard to large accounts.

"Q. Irrespective of the provisions of the policy, that is the practice for a long period Associated from time to time is asked to have an inspection made, or Associated from time to time is expected to make inspections, is that right?

"A. Yes, we make almost all of our inspections more or less of a routine nature and on the basis of some air lines we are asked to make them twice a year; for instance, the American Air Lines, we make them twice a year, and on certain other accounts only once a year.

"Q. And so far as you know no additional reports have been made to the Superior Oil Company, except this report in November, 1948?

"A. That is the only one I know about. These reports are merely routine with me, and generally I never hear what is done with them or anything after they get to the home office."

(R. 415-418, Objections of counsel and colloquy between attorneys and the Court omitted.)

It is apparent from this testimony that the making of the inspection and report complained of grew directly out of the unlawful relationship between the various Insurance Companies that formed the Association.

The above testimony plainly shows that the inspection and report are an essential part of the combination. There is no reason why (under respondents' theory) the insurers mentioned by respondents, Firemens' Fund Insurance Company and Firemen's Fund Indemnity Company, could not make the inspection and report rather

than the Association which involves fifty-nine additional companies. The reason why said two companies could not and did not make the examination and report was the unlawful combination.

The only interest claimed, or duty owed, by the entity called Associated Aviation Underwriters arose because of the illegal combination, otherwise only said two companies would be concerned.

III.

On page four of respondents' answer and elsewhere therein they stress the fact that the report made by Associated Aviation Underwriters and Superior Oil Company was marked "Personal and Confidential." Said report was not so treated by Superior Oil Company as far as Johns was concerned.

As stated by the Supreme Court of Texas in *Smith* v. *The State*, 32 Tex. 594, the fact that a communication is confidentially made does not place it in the class of privileged communications. We believe the following statement from that decision particularly applicable here is:

> "Simply because a communication is confidentially made, it does not place it in the class of privileged communications. There must be some considerations of moral duty or of public policy connected with it, in order to range it in the class of privileged communications" (p. 598).

We respectfully insist that public policy and moral duty support our position with reference to this so-called privileged communication because of the unlawful combination. To the same effect see *Cobb* v. *Garlington*, 193 S. W. 463, where the Court said in part:

> "In this connection it will be well for us to keep in mind that the term 'malice' as here used, does not import necessarily hatred, ill will, anger, wrath, or vindictiveness, but need be no more than the antithesis of good faith. If defamatory words charge an actionable crime, and there be an entire absence of malice in fact, actual damages may nevertheless be recovered. *Belo & Co.* v. *Joe Fuller,* 84 Tex. 450, 453, 19 S. W. 616, 31 Am. St. Rep. 75; *Forke* v. *Homann,* 14 Tex. Civ. App. 670, 39 S. W. 210, writ of error denied in 93 Tex. 683, 39 S. W. 210" (p. 467).

On page fifteen of respondents' answer it is stated that the decision in the Cobb case was overruled by the decision in *International & G. N. R. Co.* v. *Edmundson,* 222 S. W. 181, rendered in 1920 by the Texas Commission of Appeals.

We find the Supreme Court of Texas citing the Cobb case as late as 1942. We also find it is cited as authority in 1929, long after the decision of the Edmundson case. In *McDaniel* v. *King,* 16 S. W. 2d 931, the Cobb case is cited in support of the following statement, viz.:

> "'A "privileged communication" is one fairly made by a person in the discharge of some private or public duty, legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned.' *Cobb* v. *Garlington,* 193 S. W. 463. No communication made without truth and fairness can be privileged, fully or qualifiedly. Falsehood cannot be the foundation for privilege" (p. 932).

We refer the Court to our brief which cites a long line of Texas cases in support of the rules of law we advance, and also sets out the questions presented as we see this controversy.

IV.

On page seven of the answer respondents state that we have no support in the record for our statement that Johns could not secure employment as a pilot because this gigantic combination of insurance companies has forever damned him by its false report.

On page sixteen of our brief in support of our petition we refer to pages 520-522 of the record, which shows that Johns applied for employment as a pilot to almost all the larger corporations and oil operators in the southwest. He filed a total of about a hundred different applications with persons or companies who would ordinarily have an opening for him, but his applications were refused.

On page six of the answer respondents refer to what they call "the position" of petitioner's employers, Superior Oil Company with reference to Johns having been dishonorably discharged from the U. S. Army Air Corps, when he was 24 years old at Kelly Field, Texas, for flying an airplane on an unauthorized flight in 1932 (R. 322, 323). Johns was a private first class (R. 323) at the time, and only certain officers and other authorized personnel were authorized to fly military aircraft. Obviously they made an example of him.

There is no contention that Johns damaged the plane or flew it improperly. Neither the Superior Oil Company nor Associated Aviation Underwriters were aware of such discharge at the time the report in question was made and delivered to Superior Oil Company.

It was discovered at the time this combination of insurance companies began to "flyspeck" Johns' record from the time of his birth up to the time of trial.

The Superior Oil Company made its position clear in its pleading (R. 193) wherein it states that it discharged

plaintiff because of alleged negligence in flying W. M. Keck, Jr., then Vice President of Superior Oil Company, and there was no "position" by Superior Oil Company, as contended by respondents, that Johns 1932 discharge affected his recent discharge from that company.

The evidence shows, as is reflected by the statement of the chief pilot of Superior Oil Company, Dewey Stewart, that Johns was discharged on account of the report of Associated Aviation Underwriters (R. 363). We mention these facts on page 49 of our brief.

VI.

On page eight of respondents' answer it is stated that we cannot give a reference in the record to support our statement that Herbert, an investigator for Associated Aviation Underwriters, admitted that he had no information concerning Johns' background, etc. We not only can cite the record, but we will quote the testimony by Herbert to the effect that he did not mean to criticize Johns, but on the contrary left the whole matter up to the Superior Oil Company. In other words, he stated that the report did not apply to Johns.

We summarized such statements on pages fourteen and fifteen of our brief. Respondents quote the language of said report with reference to Johns on pages 4 and 5 of their answer. We ask this Court to consider that language and, in connection therewith the following testimony of Herbert, who made the investigation and wrote the report, viz.:

> "Q. I am talking about the three things you mention in the first paragraph, paragraph 'A,' you say 'failure to comply with company desires and verbal instructions.'

"A. This doesn't pertain to Mr. Johns.

"Q. In other words, the three things mentioned in the first paragraph don't pertain to Mr. Johns?

"A. I will just read it. I don't know whether you want to put it in the record or not. This is under 'Operations.' This is an evaluation of the operation problem. I stated, 'It is possible flight personnel employed have not been thoroughly investigated.' That means the flight personnel, present and past, and 'This lack of investigation apparently pertains to both flying ability and to background as well as personal habits and traits. This possibility is submitted as the writer was informed that in the past pilots were dismissed because of, one, lack of flying ability, two, failure to comply with company desires and verbal instructions, three, poor personal habits and traits.'

"Q. How does the next paragraph begin? What does it say? Doesn't it refer to the preceding paragraph?

"A. That is correct. I said, 'An indication of this is in the case of Carroll Lee Johns who was hired as a relief pilot.' And I go on with the information.

"Q. Consequently, when you read those two paragraphs together you are talking about Mr. Johns, are you not, as an example of the matters you have mentioned in the first paragraph; isn't that correct?

"A. Well, it possibly could be so. I don't think I definitely stated—it is stated there was an indication of it. We left it up to the Superior to make the decision" (R. 400-402).

In other words, Herbert denied that the statement in subdivision 2A which states that certain pilots of Superior Oil Company had been dismissed in the past for "1) Lack of flying ability, 2) Failure to comply with Company's desires and verbal instructions, 3) Poor personal habits, Page 2" applied to Johns although the very next sentence begins with the statement:

"An indication of this is the case of Carroll Lee Johns * * *" (pp. R. 269, p. 10 of Plaintiff's Original Exhibit No. 6 quoted by respondents on pages 4 and 5 of their answer).

Herbert also stated that there were only two sources for his report, namely, two individuals, Sherwin and Moxness. Herbert's testimony in that respect is as follows:

"Q. Except for these two inquiries you mentioned there was no other inquiry or investigation of any kind concerning Mr. Johns made in connection with this report of November 5, 1948, is that correct?

"A. That is all. We just made a preliminary investigation" (R. 410).

This does not reflect any investigation of Johns' background.

Herbert repeated that statement again in his testimony as follows:

"Q. I believe you have already stated that the two sources that you mentioned are the only sources that were investigated concerning Mr. Johns' flying ability prior to the delivery of that report?

"A. That is correct" (R. 411).

This testimony plainly shows that neither Herbert nor anyone else connected with Associated Aviation Underwriters went to the trouble of examining the detailed report kept on all pilots by the civil aviation authorities in Washington, which would have fully disclosed not only Johns' experience but whether or not he had been involved in any aircraft accidents. No such investigation was made, and it is evident that Associated Aviation Underwriters were guilty of gross indifference to Johns' rights and the truth in making said report.

Herbert testified that he did not meet Johns and that he did not make any investigation of Johns in Houston (R. 390).

The most amazing omission from the answer of respondents is that they ignore and make no mention of the false statement found in the report to the effect that Johns did not have an airline transport rating (R. 270). *The evidence clearly showed that Johns held such a rating since 1943* (R. 270, 280). *The report even went so far as to advise that the captains, of which Johns is one, should obtain A. T. R. ratings* (R. 279). *This is a misstatement of fact which could easily have been determined as false from the CAA record, or even the most casual investigation. There was no investigation of any kind made with reference to this false statement. It was sheer fiction and it was damaging to Johns.*

CONCLUSION.

The authorities discussed and cited in our brief and petition sufficiently answer respondents' arguments on the law. We believe it necessary to write this reply because of the statements and charges by respondents concerning evidence, or lack of evidence, in the record. We ask that this reply be considered in connection with our petition and brief.

Respectfully submitted,

FRED W. MOORE,
1003 State National Building,
Houston, Texas,
Attorney for Petitioner.

Copy of the foregoing reply was delivered to the firm of Baker, Botts, Andrews and Parish, Esperson Building, Houston, Texas, Attorneys for Respondents, and an additional copy to Mr. Denman Moody of that firm, this ... day of September, 1953.

_____,

Attorney for Petitioner.